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IN THE

Supreme Court of the United States

GENE SCROGGY, WARDEN,
Petitioner

versus

EUGENE GALL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner Gene Scroggy, Warden, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

CAPITAL CASE

QUESTIONS PRESENTED

In 1978, at the age of thirty-one, Eugene Gall (hereinafter "Gall") raped and murdered twelve-year old Lisa Jansen. He was convicted and sentenced to death for the crime. In 2000, during an appeal from the denial of Gall's federal habeas corpus petition, the Sixth Circuit Court of Appeals found a constitutional error that reversed his conviction and sentence. Due to the nature of the error, retrial was not available. Gall was ordered to be subjected to civil commitment proceedings or released. No other relief was given. Because Gall faced considerable jail time (including a Life sentence for another murder) in Ohio, Gall was released and extradited to serve his Ohio sentences. In 2004, Gall began a campaign to have his Kentucky murder conviction expunged - first in the Kentucky courts and then in the federal court system. Although initially the reason was kept secret by Gall, in federal pleadings in 2008 it was revealed that Gall was seeking the expungement because of his belief that it would increase his chance at parole when he becomes eligible in 2021. In *Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010),the Sixth Circuit Court of Appeals affirmed an order from the district court that nullified Gall's murder conviction and ordered Kentucky to expunge his criminal record.

The questions presented in this petition are:

I. a. WHETHER COMITY ALLOWS A FEDERAL HABEAS COURT THE AUTHORITY TO NULLIFY A STATE COURT CONVICTION - WHICH IS AKIN TO A VACATION - PURSUANT TO THE AEDPA AND PRIOR PRECEDENT FROM THIS COURT?

b. WHEN A HABEAS PETITION IS GRANTED, DO COLLATERAL CONSEQUENCES RENDER EXPUNGEMENT OF THE UNDERLYING CONVICTION AUTOMATIC?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) Gene Scroggy, Warden, Kentucky State Penitentiary; and (2) Eugene Gall.

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OPINION BELOW

The Petitioner seeks certiorari review of the published panel decision from the Untied States Sixth Circuit Court of Appeals in *Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010). Petitioner's Appendix ("App.") 1-54. In the aforementioned case, the Sixth Circuit affirmed a decision from the United States District Court for the Eastern District of Kentucky that granted Gall's motion to enforce a prior judgment from the Sixth Circuit - thus nullifying Gall's Kentucky murder conviction and ordering the Commonwealth of Kentucky to expunge Gall's criminal record. App.55-98 (Memorandum Opinion and Order); App.99-142 (Magistrate's Report and Recommendation).

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254. The petitioner seeks certiorari review of a United States Court of Appeals Opinion decided April 29, 2010.

Rehearing was not sought in this case and this petition is timely pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III § 2 - "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . ."

28 U.S.C. § 2243 - ". . .The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

A. Facts.

On April 5, 1978, Petitioner, Eugene Gall ("Gall") kidnapped a twelve-year old girl, Lisa Jansen, while she was on her way to school. It became apparent after the encounter that Jansen was missing when her jacket and one of her school books were discovered laying in the road near Verona, Kentucky. During the time Jansen was with Gall, he raped her. Eventually Gall shot Jansen in her back and head - killing her - and left her body on the side of the road. Shortly thereafter, Gall perpetrated an armed robbery in

nearby Gardnersville that culminated in a police pursuit. Gall shot an officer (hitting him twice) during his attempted escape. Gall was finally apprehended and linked to the aforementioned crimes.

B. Procedural History.

After a trial by jury, Gall was found guilty and sentenced to death for the murder of Lisa Jansen - which was affirmed on appeal. *Gall v. Commonwealth*, 607 S.W.2d 97, 113 (Ky. 1980)(*Gall I*)(certiorari denied by *Gall v. Kentucky*, 450 U.S. 989 (1981)). Post-conviction relief (via Kentucky Rule of Criminal Procedure [RCr] 11.42) was also denied. *Gall v. Commonwealth*, 702. S.W.2d 37 (Ky. 1985)(*Gall II*)(certiorari was denied by *Gall v. Kentucky*, 478 U.S. 1010 (1986)).

After his appeals in the Kentucky court system, Gall filed a petition for federal habeas corpus review of his conviction in the United States District Court - Eastern District of Kentucky. Gall's habeas petition was denied. On appeal to the United States Sixth Circuit Court of Appeals, the denial of Gall's petition was reversed and remanded for a conditional granting

of the writ with directions.[1] *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000)(*Gall III*)(certiorari denied by *Parker v. Gall*, 533 U.S. 941 (2001)). Because of double jeopardy, under the Sixth Circuit's rationale, Gall could not be retried.

On remand, the district court directed that Gall be released from state custody within 90 days, but gave the Commonwealth an additional 30 days of custody if it elected to initiate civil commitment proceedings. See *Gall v. Scroggy*, 69 Fed.Appx. 251 (6th Cir. 2003)(*Gall IV*)(unpublished). Gall argued to the district court that the Commonwealth was required to initiate a civil commitment proceeding. *Id.* The district court ruled against Gall but granted him a certificate of

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[1] The Sixth Circuit Court of Appeals reversed primarily upon the finding that the evidence did not establish Gall's murder conviction, as the Commonwealth did not prove an element of the crime - lack of extreme emotional disturbance. However, it was also noted that the death sentence was obtained pursuant to instructions erroneously limiting consideration of mitigating factors in violation of Gall's due process rights and that exclusion of a venireman who was uncertain about his views on death penalty was reversible error. Because double jeopardy barred a retrial, and because the underlying charge for which Gall could be found guilty, first-degree manslaughter, carried a twenty (20) year maximum penalty - and Gall had already served more than that amount - the Sixth Circuit ordered that Gall be subjected to civil commitment proceedings or released.

appealability. *Id.* Within 90 days of the judgment, Gall was released via extradition to Ohio to serve sentences for convictions in that state. *Id.* The Commonwealth moved to dismiss the appeal as moot. *Id.* The Sixth Circuit held that a stay was not warranted, a dismissal of appeal as moot was not warranted, and that Gall was not entitled to a judgment directing Kentucky to grant him an involuntary hospitalization proceeding. *Id.*

On May 18, 2004, Gall filed an equity motion pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 in Boone Circuit Court seeking to vacate his judgment of conviction. No reason was given for the motion other than representations regarding supremacy and enforcement of the rule of law. The motion was denied. On appeal, Gall vaguely alleged that his Kentucky murder conviction was effecting his treatment and placement in the Ohio prison system, however, no further details were given. For multiple reasons, the denial of the motion was affirmed on appeal. *Gall v. Commonwealth*, 2006-CA-112, 2007 WL 1575303 (Ky.App. 2007)(*Gall V*)(unpublished) - App. 143-154. In particular, the Kentucky Court of

Appeals noted that the federal district court had declined to nullify Gall's conviction when relief was granted in 2000, that Gall procedurally defaulted the claim by failing to raise it in his 2003 federal appeal, and that equitable grounds (factual guilt and future danger to the public) did not support vacating the conviction, i.e., doing so would not lead to a just result. In a summary order, discretionary review was denied by the Kentucky Supreme Court on March 12, 2008 (Case No. 2007-SC-464).

On April 15, 2008, Gall raised this issue in the district court when he filed his Motion/Memorandum to Enforce October 30, 2000 Judgment of the Sixth Circuit - seeking to have Gall's 1978 murder conviction declared void and ordering the state to vacate the judgment. The motion was referred to Magistrate Judge J. Gregory Wehrman (by U.S. District Judge Danny C. Reeves). In opposition to Gall's motion, on May 30, 2008, the Warden filed a Response to Motion to Enforce Judgment. In a reply, Gall finally revealed the reason for his motion - concern that his Kentucky murder conviction might have an adverse effect on his potential for parole in Ohio in 2021. Magistrate Judge

Wehrman issued a Report and Recommendation, on October 15, 2008, and recommended that Gall's motion be granted. App. 99-142. After the filing of objections[2] and responses to the objections, on December 4, 2008, Judge Reeves issued a Memorandum Opinion and Order that (1) adopted the Magistrate's Report and Recommendation; (2) overruled the Warden's objections; (3) granted Gall's motion to enforce; (4) nullified Gall's Kentucky conviction for Lisa Jansen's murder; and (5) directed the Commonwealth of the Kentucky to expunge the conviction. App. 55-98.

On April 29, 2010, in a 2-1 decision, a panel of the Sixth Circuit Court of Appeals affirmed the decision of the district court. *Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010)(*Gall VI*) - App.1-54. The majority

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[2] The Warden argued that the motion should be denied for the following reasons: (1) Lack of Jurisdiction/Mootness - because the Warden complied with the conditions of the writ and released Gall; (2) Improper Venue - that the motion should have been filed in the venue where Gall is located [Ohio] and also where collateral consequences will be imposed; (3) Insufficient Pleadings - that Gall's claim of adverse parole consequences in 2021 was insufficiently pled and failed to show a case or controversy (both remote and speculative); (4) Procedural Default/Waiver - for failing to raise this issue in Gall's 2003 appeal; and (5) Equitable Considerations - justice does not require nullification/expungement due to factual guilt and safety concerns.

found no procedural impediments to Gall's motion, and found that because the conviction was unconstitutional it must be nullified and expunged. The majority opinion was based primarily on the presumed collateral consequences corresponding with a conviction appearing on one's criminal record - making nullification/expungement a requirement upon granting of the writ. In dissent, Judge Jack Zouhary opined that Gall's case was moot because the Ohio parole authority would consider the murder of Lisa Jansen regardless of whether the conviction was nullified/expunged, and also concluded that a public safety exception should exist which prevents automatic nullification/expungement in a case with circumstances such as those present in this case (an obviously guilty individual likely to face no collateral consequences - and whom the Sixth Circuit had previously deemed dangerous, likely to re-offend, and unfit to ever again be amongst free society).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN ORDER TO HARMONIZE TWO CONFLICTING LINES OF AUTHORITY STEMMING FROM *FAY v. NOIA*, 372 U.S. 391 (1963), AND *CARAFAS v. LaVALLEE*, 391 U.S. 234 (1968) AND TO PROPERLY DEFINE THE SCOPE OF RELIEF AUTHORIZED BY 28 U.S.C. § 2243 - INCLUDING THE POWER TO NULLIFY STATE COURT CONVICTIONS AND AUTOMATIC EXPUNGEMENT UPON GRANTING OF THE WRIT.

A. Conflicting Precedent - *Fay* vs. *Carafas*.

In its jurisprudence on this issue, the Sixth Circuit Court of Appeals has usurped power from the State courts, and - at least initially - avoided running afoul from valid precedent of this Court by engaging in legal manuevering that relies on semantics. By creating the concept of "nullification" - which is akin to vacating a conviction - the Sixth Circuit has ignored precedent from this Court which has held that the federal circuits are prevented, under the powers delineated via the writ of habeas corpus, from revising, voiding, or vacating a state court judgment.

In *Fay v. Noia*, 372 U.S. 391, 430-431 (1963), this Court found that,

> Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

See *Wilson v. Lawrence County*, 154 F.3d 757, 761 (8th Cir. 1998) ("[a] writ of habeas corpus does not reverse or void the state judgment of conviction"); *Henderson v. Frank*, 155 F.3d 159, 168 (3rd Cir. 1998) (federal court in habeas proceeding has no authority to revise the state court judgment; court may determine only whether there is an improper detention and, if so, order the release of the prisoner conditioned on the State's opportunity to correct errors); *Smith v. Spina*, 477 F.2d 1140, 1147-48 (3d Cir.1973) ("Although this court has ordered that a writ of habeas corpus issue, such action is not the equivalent of a reversal of a state conviction. Only the Supreme Court has power, on direct appeal, to reverse a state judgment of conviction."); *Duhamel v. Collins*, 955 F.2d 926, 968 (5th Cir. 1992) (A federal habeas court is empowered to

dispose of the matter as law and justice require, but a federal district court does not have the authority to commute a death sentence to life imprisonment); *Wanatee v. Ault*, 120 F.Supp. 784 (N.D. Iowa, 2000), (". . .court had no other power than to order Wanatee's release."); *Madigan v. Snyder*, 804 N.E.2d 546, 554 (Il. 2004) ("A federal court considering a state prisoner's petition for writ of habeas corpus does not have the authority to revise a state court judgment").

In its unpublished disposition of *Moore v. Rose*, 19 F.3d 1433 (Table), 1994 WL 102958 (6th. Cir 1994), the Sixth Circuit expressly indicated its agreement with the holding of *Fay, surpa*, when determining the appropriateness of a remedy. See also *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010)(BATCHELDER, concurring) and *Mapes v. Tate*, 388 F.3d 187, 195 (6th Cir. 2004)(citing *Moore v. Rose* with approval). Similarly, in *Barry v. Brower*, 864 F.2d 294, 300 (3rd Cir. 1988), the Third Circuit found that,

> Although the district court did not err in granting Barry a writ of habeas corpus, it went beyond its power in directly ordering the Appellate Division of the New Jersey Superior Court to reinstate his appeal. Both the historic nature of

> the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct of state litigation.

See also *Smith v. Lucas*, 9 F.3d 359 (5th Cir. 1993) and *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985)(federal courts do not have continuing oversight of subsequent state court proceedings following the state's compliance with a grant of a conditional writ of habeas corpus.).

Based on the express language in *Fay, supra*, and other supporting authorities, it appears clear that a federal habeas court cannot grant relief directly affecting the state court's judgment. For, in *Fay* this Court indicated that the question as to what relief a federal court could grant in a habeas proceeding was a question that had important implications for federal-state relations. *Fay*, 372 U.S. at 399. Furthermore, quoting prior precedent, it was found that, "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . . Solution was found in the doctrine of comity between courts. . .'" Id. at 838 (additional citations omitted). Comity

between the courts in this instance refers to a situation "whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere". *Hartford Fire Ins. Co. v. California*, 509 U.S 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)(SCALIA, dissenting).

Nevertheless, in *Carafas v. LaVallee*, 391 U.S. 234 (1968), it was held by this Court that a federal court could fashion relief as justice requires. See also 28 U.S.C. § 2243. Specifically, this Court in *Carafas* found that a petitioner's challenge was not mooted by his release from incarceration prior to his hearing because of the collateral consequences that stemmed from his convictions and authorized a federal court to fashion relief necessary to alleviate the collateral consequences. *Id.* at 237; See *Sibron v. New York*, 392 U.S. 40 (1968). That case refers to the power of habeas court to act, presumably in such manner as ordering civil liberties be restored or preventing other collateral consequences, whether through the writ itself or subsequent injunctive relief. See *Wood v. Ross*, 434 F.2d 297, 300 (4th Cir. 1970) (successful habeas corpus petitioner entitled to declaration that his conviction

have no effect and to preclude consequences which might otherwise result); *Jeanty v. Bulger*, 204 F.Supp.2d 1366 (S.D.Fla. 2002) (a court granting a writ of habeas corpus may also issue an injunction in aid of the writ). It is against the backdrop of *Carafas* that the Sixth Circuit has expanded the remedies available to habeas petitioners beyond the proper limits of habeas relief.

B. *Gentry v. Dueth.*

The primary basis for the holding in *Gall VI* was reliance by the Sixth Cirucit on one of its own prior cases, *Gentry v. Deuth*, 45 F.3d 687 (6th Cir. 2006). In that case, Gentry had been convicted of driving under the influence and manslaughter and was sentenced to five (5) years in prison. After unsuccessful appeals in the Kentucky court system, she filed a federal habeas petition. She was released while the petition was pending. After initially denying the petition, the district court altered its course and granted Gentry a conditional writ - giving Kentucky ninety (90) days to retry Gentry. When retrial did not occur, Gentry filed a motion to enforce the prior judgment by voiding the

prior conviction so as to free her from its collateral consequences. The motion was granted. In affirming the order granting Gentry's motion, the Sixth Circuit introduced a new concept, holding that although it could not vacate the conviction, it had the authority to "nullify" it in this circumstance.

In *Gentry*, the Sixth Circuit conceded that no Supreme Court authority existed that would directly authorize a federal district court to void a state court judgment by acknowledging that, "the courts have heretofore had little occasion to speak directly to the district court's authority to nullify an unlawful state conviction. . ." Nonetheless, the Sixth Circuit reasoned that justice requires such relief be available to release a successful petitioner from the collateral consequences stemming from the unlawful conviction. *Gentry*, 45 F.3d at 696-697. The panel decision in this case is an extension of that rationale.

To avoid *Fay* and the pitfalls of *stare decisis*, in *Gentry* the Sixth Circuit relied on and interpreted the *Carafas* line of authority as permitting a federal habeas court to grant any relief, including declaring a state court conviction null and void, as required by

justice. *Gentry v. Deuth*, 45 F.3d 687, 693 (6th Cir. 2006)(citing *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Sibron v. New York*, 392 U.S. 40 (1968)). The Sixth Circuit attempted to justify its reliance on *Carafas* by noting it was decided subsequent to *Fay* and because it could fit its rationale within the language of 28 U.S.C. § 2243. However, this explanation was insufficient given that *Fay* continues to be good law that is routinely relied on and cited as limiting the scope of relief available to a successful petitioner by the numerous federal courts.

The Sixth Circuit's holdings in *Gentry* and *Gall VI* have stretched the original purpose of the writ to its absolute extreme. Although it is evident that this Court has sought to expand the scope of relief available to a federal habeas court to include more than just release, it is also evident that this Court has not gone so far as to authorize a federal habeas court to simply null and void a state court's judgment of conviction. Calling it a "nullification" is nothing more than semantics, the Sixth Circuit has vacated Gall's conviction. This rationale offends comity between the federal and state courts by permitting the federal court

to directly affect the state court conviction, thereby condoning the ultimate encroachment on the state's sovereignty - regardless of the state court's ruling on the matter. To authorize such relief violates the fundamental tenets of our system of federalism. Thus, it is incumbent on this Court to finally resolve this conflict and determine the extent of a federal habeas court's power to grant relief directly affecting a state court's judgment.

C. The Required Expungement/Nullification.

Pursuant to the Sixth Circuit's holding in *Gall VI*, "the full relief implied by the writ is the elimination of all direct and collateral consequences, nullification of the conviction and expungement of the conviction from one's record are naturally and necessarily implicit in granting the writ". *Gall VI*, 603 F.3d at 352. App. 15-16. Justification for expungement/nullification as an automatic remedy was traced to *Gentry*, which held that "[a]s a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of the conviction from

the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction.". *Gentry*, F.3d. at 696. While the *Gentry* opinion used this statement to justify the nullification concept, it effectively declared expungement and nullification to be an automatic remedy in cases in which a habeas petition is granted - due to the presumption of collateral consequences stemming from the criminal conviction. *Id.* at 694-695.

The automatic nature of expungement/nullification relief is evident by the level of injury the Sixth Circuit has required to be pled in order to receive relief. The *Gentry* Court held that "[w]ith respect to injury, an essential element of a live controversy, the law does not require a habeas petitioner to prove by a preponderance of the evidence that she may face collateral consequences of her unconstitutional felony conviction, for the disabilities consequent to a felony conviction are legion, and patently obvious in many cases.". A "minimal showing of possible collateral consequences" was all that was required. Id. In *Gentry*, the Sixth Circuit held that the petitioner's citation to various Kentucky statutes that

stripped her of civil liberties was sufficient to meet the minimal showing. Id. at 695. This holding, i.e., the minimal showing, has made relief automatic.

However, in *Lane v. Williams*, 455 U.S. 624, 633 n. 13 (1982), the majority of this Court, by way of footnote, addressed Justice Marshall's dissenting position that a mere possibility of a collateral consequence prevents a petition for writ of habeas from being rendered moot finding, "[c]ollateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." Indeed, a habeas petitioner, operating to attack a judgment from a collateral position, should be required to show actual harm or injury. Simply noting awareness of existence of any collateral consequences should not be sufficient.

With regard to actual collateral consequences Gall would face, in his initial pleading he simply relied on the concept of collateral consequences of a criminal conviction to justify expungement/nullification. When pressed, in his reply pleading, he (for the first time) indicated that he was concerned with the Kentucky

conviction's effect on his parole in Ohio in 2021. Because Gall has many Ohio convictions[3], and another first-degree assault conviction in Kentucky for shooting a state trooper during his attempted escape, Gall was not entitled to the presumption (as most collateral consequences are imposed upon release) and cannot show that this particular conviction will be the cause of a future parole denial (given his other, extensive criminal history).

Gall cannot show actual harm of any kind, therefore, the Sixth Circuit's conclusion that expungement/nullification is required due to the very existence of his conviction is incongruent with precedent from this Court and the particular circumstances of this case. As noted by the dissent below, "the normal presumption of collateral consequences - quite appropriate in cases where the petitioner is actually released - does not hold here". *Gall VI*, 603 F.3d at 360 (Zouhary dissenting). App. 43. In fact, the dissenting judge below, a federal

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[3] According to the Ohio Department of Corrections website, Gall is presently incarcerated in Ohio for Aggravated Murder, Rape (4 counts), Attempted Rape, Kidnaping (2 counts), Aggravated Robbery, and Armed Robbery.

district judge sitting by designation from the Northern District of Ohio, and thus more well-versed in Ohio law than undersigned counsel[4], noted that the Ohio Parole Board has "broad discretion" when making parole decisions and does not make its decision by simply "tallying the number of past convictions on a prisoner's record". *Id.* Indeed, by statute and administrative directive, the Ohio Parole Board has been free to consider invalid convictions if supported by "persuasive information that the offender committed the criminal act". *Id.* (citing to Ohio Rev. Code § 2967.03 and Ohio Parole Board Guidelines Manual, Part C. § A.7 (3d ed.

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[4] The Sixth Circuit stated in a footnote that the dissent was more persuasive in its rebuttal of the presumption of collateral consequences than undersigned counsel regarding the Ohio Parole Board's potential consideration of the conviction (including if expunged). Gall VI, 603 F.3d. 355, fn. 8. App. 26 However, undersigned counsel argued that Gall was in the incorrect venue, as the alleged injury to Gall, imposed by the Ohio Parole Board via consideration of the conviction, should be litigated in the forum where the consequence occurs. Such a finding would have alleviated the need for a Kentucky attorney to attempt to rebut a collateral consequence that will be imposed by another jurisdiction. It would come as no surprise that the learned federal district judge, sitting by designation on the Sixth Circuit Court of Appeals in this case, would be more astutely aware of the inner-workings and current policies of the Ohio Parole Board than an out-of-state attorney.

July 1, 2007)[5]). Such persuasive information exists in this case, as the Sixth Circuit itself, when granting Gall's habeas, noted "[t]here is little doubt that Gall committed" the rape and murder of Lisa Jansen in a "cruel and grisly fashion" - *Gall III*, 231 F.3d 265, 278 (6th Cir. 2000)[6] . Given this conclusion, Gall is incapable of showing injury - minimal or otherwise.

D. Equity/Public Safety.

A Kentucky Civil Rule 60.02 action is an action in equity. The Warden would assert that the federal court's power to grant relief to a habeas petitioner as required by "justice" is synonymous. Therefore, comity dictates a different result than that delineated by the Sixth Circuit in *Gall VI*. The Kentucky Court of Appeals concluded that the Boone Circuit Court did not

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[5] It was also noted that on April 1, 2010, the Guidelines were rescinded in favor of an approach that gave the Parole Board even more discretion to consider relevant facts in an individual prisoner's case. *Gall VI*, 603 F.3d at 360, fn. 2. App. 47. (Zouhary dissenting).

[6] The Sixth Circuit also noted, that, "[i]t is also evident that Eugene Gall is the man who cut her life short". *Gall III*, 231 F.3d 265, 278 (6th Cir. 2000). The Sixth Circuit noted that the circumstantial evidence against Gall was "overwhelming". Id at 282.

abuse its discretion when it ruled that Gall was not entitled to the relief - relying in part on equitable grounds that do not support the vacation of the conviction, i.e., that doing so would not lead to a just result. *Gall V, supra*. App. 153-154. In particular, Gall's obvious factual guilt, as well as, the potential danger to the public if he were released support a different result. For as noted by the Sixth Circuit when reversing the denial of Gall's habeas petition in 2000, Gall is "extremely" and "permanently dangerous" with a "high potential of future dangerousness" and should "never be allowed to become a free member of the society again". *Gall III*, 231 F.3d at 336. The dissent below found that as the standard notes, remedies are limited to all that justice require, and in this case, because of the mental instability of Gall and the likely danger he would present to the public if he were released, justice does not dictate expungement/nullification. *Gall VI*, 603 F.3d at 362 (Zouhary dissenting). App. 53-54.

The relief fashioned in *Gall III* was designed with the belief that Gall was "incurable" and his condition "permanent" such that he would be institutionalized

for an "indefinite" term. *Gall III*, 231 F.3d at 336. Gall's own expert witness at trial, Dr. Noelker, found that Gall had "severe sexual disturbance associated with extreme dangerousness to members of the opposite sex". *Gall I*, 702 S.W.2d 37, 40 (Ky. 1985). In short, if released, Gall would re-offend. The relief in *Gall III* was designed with the clear intent of preventing Gall from getting such an opportunity. Gall is now hoping to use that opinion - the same opinion that sought to keep him permanently institutionalized - as a tool to facilitate his release. Justice does not call for such a result. See *Duke v. White*, 616 F.2d 955 (6th Cir. 1980)("[t]he right to expungement of state records is not a federal constitutional right").

E. Gall's Procedural Impediments

1. Procedural Default.

In 2001, after Gall's habeas denial had been reversed, Gall's attorneys filed a motion to implement this Court's opinion in *Gall III*. An order tendered with the motion sought for the district court to "vacate" Gall's conviction. The district court's judgment did not incorporate this language or anything similar. Gall

appealed, attempting to have the Sixth Circuit compel Kentucky to initiate an involuntary commitment proceeding - as opposed to releasing him for extradition to Ohio. Because *Gall III* prevented retrial, the lack of viability of Gall's conviction was evident at that time. Nevertheless, when Gall appealed he did not raise this issue, thus procedurally defaulting the claim. See *Gall IV, supra.* If Gall's position is correct, and *Carafas* is the basis for the availability of nullification/expungement as a remedy, and same is effectively automatic upon granting the writ, it would follow that Gall was deficient for failing to raise this issue in his prior appeal. See, e.g., *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006)(collecting cases for support that federal courts have long recognized their power to expunge criminal records of unconstitutional convictions). Gall's failure to raise this claim in his appeal, and waiting until 2008 to move the federal courts for relief (when his parole date should have been available to him since his incarceration in Ohio in 2001), acted as a waiver and rendered the claim procedurally defaulted.

2. Lack of Jurisdiction.

The Sixth Circuit conditionally granted Gall's petition for habeas relief and remanded the case to give Kentucky the option of subjecting Gall to an involuntary hospitalization proceeding or releasing him. *Gall III*, 231 F.3d at 335-336. After remand for proceedings consistent with the opinion, the district court entered a judgment that ordered Gall released within ninety (90) days - or the Commonwealth of Kentucky could retain custody of Gall for an additional thirty (30) days if the Commonwealth elected to conduct a civil commitment proceeding subject to Kentucky Revised Statutes (KRS) Chapter 202A. Within the time frame specified, Gall was released by the Commonwealth of Kentucky and extradited to Ohio. Therefore, the conditions of the writ were met. The Commonwealth did not fail to act on a condition contained in the Judgment - Kentucky complied with the judgment and Gall's subsequent motion to enforce was seeking extrajudicial relief. See *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006)("when a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court

does not retain any further jurisdiction over the matter" - citing *Pitchess v. Davis*, 421 U.S. 482, 490, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975)).

Jurisdiction in *Gentry* was retained because the Commonwealth failed to abide by the condition (retrial) established by the district court. *Gentry*, 456 F.3d at 691. ("[t]he Commonwealth unquestionably failed to grant Gentry a new trial, and therefore it failed to abide by the condition that the district court had established"). While it is correct that "[a] federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case", when a state meets the terms of the habeas court's condition, no jurisdiction over the matter is retained. See *Gentry*, at 692. "Conditional grants of writs of habeas corpus are final orders, exactly like absolute grants, and they ordinarily and ideally operate automatically, that is, without the need for the district court to act further". *Id.* (internal citation omitted). As noted in *Gentry*, "the sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform

the established condition, at which time the writ springs to life". *Id*; *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006)(habeas court acted within its authority in ordering immediate release of habeas petitioner after state failed to comply with conditions of conditional writ, which required state to reoffer six to 20-plea bargain that trial counsel had failed to convey to petitioner). In Gall's case, the Commonwealth did not fail to perform a condition - Gall was released within the time period specified in the judgment. From that basis, because the Commonwealth performed the established condition, jurisdiction was not retained. See *Gonzalez v. Crosby*, 545 U.S. 524 (2005); *Calderon v. Thompson*, 523 U.S. 538 (1997)(rejecting continuing jurisdiction/re-examination of habeas judgments for error theory as a basis to re-open habeas judgments).

CONCLUSION

WHEREFORE, certiorari review should be granted for a complete merits review before this Court.

Respectfully submitted,

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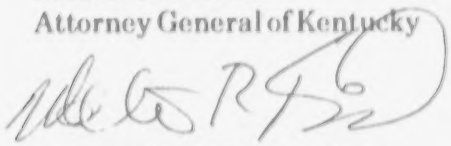

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